

FEB 4 1978

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL RODAK, JR., CLERK

OCTOBER TERM, 1977

No. 77-822

---

In the Matter of the Application of  
JOHN LANE, JR.,  
Appellant,  
for a Judgment Under Article 78 of  
the Civil Practice Law and Rules, etc.

v.

NORMAN F. GALLMAN, President, et al.,  
constituting the STATE TAX COMMISSION OF  
THE STATE OF NEW YORK,  
Respondents

---

On Appeal From the Court of Appeals  
of the State of New York

---

APPELLANT'S BRIEF IN OPPOSITION  
TO MOTION TO DISMISS OR AFFIRM

---

FEBRUARY 1978

JOHN LANE  
14 Wall Street  
New York, N.Y. 10005  
Tel.: 212-233-7780  
JOHN LANE, JR.  
Attorneys for Appellant

---

INDEX

	<u>Page</u>
I. Respondents Misstate the Issue . . .	2
II. Respondents Erroneously Assert Lack of Jurisdiction for Failure To Raise the Constitutional Is- sues Timely Below (p. 3 of Motion) .3	
A. Unconstitutionality Was Timely Asserted Before the First Lower Court Decision (the Appellate Division's) . . . . .	3
B. Unconstitutionality Was Timely Asserted on Motion for Reargu- ment After Appellate Division's Unexpected Construction of the Tax Law . . . . .	5
C. Constitutional Issues Were in Fact Decided by the Court of Ap- peals, Precluding Inquiry into Timeliness of Assertion . . . . .	6
Conclusion . . . . .	8
Appendices (Supplementing Jurisdictional Statement)	
I. Excerpts from Affidavit in Sup- port of Appellant's Motion for Reargument or Leave to Appeal to Court of Appeals, Filed in Appellate Division . . . . .	I-1
J. Argument Headings from Brief for Petitioner-Appellant in Court of Appeals . . . . .	J-1

Table of Authorities

CASES:

<u>Charleston Federal Savings &amp; Loan Association v. Alder- son, 324 U.S. 182, 185-86 (1945) . . . . .</u>	7
<u>District of Columbia v. Davis, 371 F.2d 964 (D.C. Cir.), cert. denied, 386 U.S. 1034 (1967) . . . . .</u>	4, 9
<u>Great Northern Railway Co. v. Sunburst Oil &amp; Refining Co., 287 U.S. 358, 367 (1932) . . .</u>	6
<u>Herndon v. Georgia, 295 U.S. 441, 443-44, 447 (1935) . . . .</u>	6
<u>International Steel &amp; Iron Co. v. National Surety Co., 297 U.S. 657, 665 (1936) . . . . .</u>	6
<u>Kritzik v. Gallman, 41 App. Div. 2d 994, 344 N.Y.S.2d 107 (1973) . . . . .</u>	5
<u>Lawrence v. State Tax Commis- sion, 286 U.S. 276, 282-83 (1932) . . . . .</u>	7
<u>Lynum v. Illinois, 368 U.S. 908 (1961) . . . . .</u>	8
<u>United States v. Jin Fuey Moy, 241 U.S. 394, 401 (1961) . . .</u>	8-9
<u>Whyy, Inc. v. Borough of Glass- boro, 393 U.S. 117, 119 (1968). 7</u>	

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-822

---

In the Matter of the Application of  
JOHN LANE, JR. Appellant,  
for a Judgment Under Article 78 of  
the Civil Practice Law and Rules, etc.

v.

NORMAN F. GALLMAN, President, et al.,  
constituting the STATE TAX COMMISSION OF  
THE STATE OF NEW YORK, Respondents

---

On Appeal From the Court of Appeals  
of the State of New York

---

APPELLANT'S BRIEF IN OPPOSITION  
TO MOTION TO DISMISS OR AFFIRM

---

This case challenges New York  
State's jurisdiction to tax appellant on  
out-of-state income earned during the  
balance of the year appellant permanently  
left the state.

-2-

I. Respondents Misstate the Issue

Respondents open their statement of  
the case by misstating, as though uncon-  
tested, that "[t]he Appellant was domi-  
ciled in New York State throughout 1965."  
(p. 1 of Motion) That, however, is pre-  
cisely the main issue on the merits of  
this case--i.e., whether the New York Tax  
Law may constitutionally tax as domicil-  
ed and therefore resident in New York  
throughout 1965 a person like appellant  
who permanently left New York on March 1,  
1965, thereafter neither retaining nor  
ever again maintaining any place of abode  
in New York nor enjoying any benefits in  
New York.

Respondents close their Motion with  
the argument, as though contested, that  
"domicile within a state is a valid basis  
for the imposition of an income tax by  
states. [with citations]" (pp. 9-10 of

Motion) Not only is that not in issue, however, but appellant himself relies on this same fundamental principle of state tax jurisdiction (with the term "domicile" properly understood) and on the precise line of authority respondents cite. (See pp. 24-25 of Jurisdictional Statement)

Thus respondents attempt to misdirect the Court's attention from the main, truly substantial constitutional issue to a nonissue which is not substantial and indeed does not even exist.

II. Respondents Erroneously Assert Lack of Jurisdiction for Failure To Raise the Constitutional Issues Timely  
Below (p. 3 of Motion)

Respondents' attack on jurisdiction for untimely assertion of unconstitutionality fails on three counts.

A. Unconstitutionality Was Timely Asserted Before the First Lower-Court Decision (the Appellate Division's)

See pages 17-19 of Jurisdictional

Statement, uncontested by respondents.

(1) They themselves introduced constitutionality of the tax in their brief to the Appellate Division; (2) upon oral argument appellant informed that court in substance of the main constitutional issue (citing as authoritative District of Columbia v. Davis, 371 F.2d 964 (D.C. Cir.), cert. denied, 386 U.S. 1034 (1967)), which presented on indistinguishable facts the identical Due Process question as this case); and (3) appellant's post-argument letter (App. G to Jurisdictional Statement) (i) discussed the Tax Law definitions of "resident" and "domicile" (which have inherent constitutional significance), (ii) confirmed the oral argument reference to Davis, and (iii) cited several other authorities directly involving constitutionality of state taxation of income earned before entering or after



leaving the state.

B. Unconstitutionality Was Timely  
Asserted on Motion for Reargument  
After Appellate Division's Un-  
expected Construction of the Tax  
Law

The Appellate Division's construction of the Tax Law against appellant was directly contrary to its own precedent--the only one in the New York courts--in Kritzik v. Gallman, 41 App. Div. 2d 994, 344 N.Y.S.2d 107 (1973). (See pp. 29-31 of Jurisdictional Statement.) Thus it was unexpected.

The affidavit of the undersigned in support of appellant's Motion for Reargument or Leave to Appeal to Court of Appeals, filed in the Appellate Division, more fully discussed the Due Process issue. (See excerpts set forth in Appendix I, infra.) Moreover, appellant's brief in the Court of Appeals presented both the Due Process and the Equal Pro-

tection issues squarely and extensively. (See Argument headings set forth in Appendix J, infra.)

If the pre-decision presentation of the issues (see A above) is deemed insufficient, the subsequent, more extensive presentations certainly sufficed, and were timely because of the unexpected nature of the Appellate Division's decision. Great Northern Railway Co. v. Sunburst Oil & Refining Co., 287 U.S. 358, 367 (1932); Herndon v. Georgia, 295 U.S. 441, 443-44, 447 (1935); International Steel & Iron Co. v. National Surety Co., 297 U.S. 657, 665 (1936).

C. Constitutional Issues Were in  
Fact Decided by the Court of Ap-  
peals, Precluding Inquiry into  
Timeliness of Assertion

It is uncontested that appellant briefed at length in the Court of Appeals the same constitutional issues here pre-

sented. (Compare pp. 23-32 of Jurisdictional Statement with Argument headings set forth in Appendix J, infra.)

Refusal to recognize existence of a substantial constitutional issue on the merits is effectively a decision thereon. Lawrence v. State Tax Commission, 286 U.S. 276, 282-83 (1932). Hence the Court of Appeals' dismissal "upon the ground that no substantial constitutional issue is directly involved" (see App. C of Jurisdictional Statement) constituted a rejection on the merits of appellant's constitutional attack upon the New York Tax Law and upon the Appellate Division's denial of equal protection. This precludes inquiry into timeliness of assertion of the issues in the lower state courts. Whyy, Inc. v. Borough of Glassboro, 393 U.S. 117, 119 (1968); Charleston Federal Savings & Loan Association v. Alderson, 324

U.S. 182, 185-86 (1945).

The remittitur (not before this Court and totally unknown to appellant) and the remittitur cases cited by respondents (p. 9 of Motion) are irrelevant because appellant has otherwise shown that the constitutionality of a state statute was drawn in question and resolved affirmatively. If a clearer showing is required, however, appellant requests leave to seek amendment of the remittitur or issuance of a certificate by the Court of Appeals, or remand conditional upon issuance thereof. Cf. Lynum v. Illinois, 368 U.S. 908 (1961).

#### CONCLUSION

This Court should reverse or vacate and remand to the New York Court of Appeals for adequate consideration of the serious constitutional issues of this case in light of United States v. Jin

Fuey Moy, 241 U.S. 394, 401, (1961), which requires construction of a statute to avoid grave constitutional questions. District of Columbia v. Davis, 371 F.2d 964 (D.C. Cir), cert. denied, 386 U.S. 1034 (1967), applied that doctrine to indistinguishable facts and is controlling here.

If remand is inappropriate, then the Court should note probable jurisdiction and proceed to hear and decide the merits.

RESPECTFULLY SUBMITTED,

JOHN LANE  
JOHN LANE, JR.

Attorneys for Appellant

February, 1978

## APPENDIX



EXCERPTS FROM AFFIDAVIT OF JOHN LANE IN SUPPORT OF APPELLANT'S NOTICE OF MOTION FOR REARGUMENT OR LEAVE TO APPEAL TO COURT OF APPEALS, FILED IN APPELLATE DIVISION, THIRD JUDICIAL DEPARTMENT, OF THE NEW YORK SUPREME COURT, DATED DECEMBER 1, 1975 (Index No. 7478-73)

(Captions omitted)

\* \* \*

STATE PUBLIC POLICY WITH RESPECT TO THE QUESTION OF CONSTITUTIONAL JURISDICTION TO TAX

AND

A JUDICIAL POLICY IN RESPECT OF ALL KINDS OF POSSIBLE CONSTITUTIONAL PROBLEMS

In light of the Legislative Committee Reports (Exhibits B and D annexed hereto) recommending the two amendments of 1922 and the amendment of 1934, there is no escaping the fact that these amendments manifest a public policy of the State of New York to tax every person as a resident or a nonresident strictly in accordance with the periods when he was or was not actually a resident of New York, out of a sense of justice, as well

as to avoid constitutional problems.

\* \* \*

The Lawrence case, the leading case on the subject, dealt with income earned by an [actual] resident of Mississippi, but from the construction of highways outside the state. The Supreme Court upheld the Mississippi income tax thereon as a tax on a person "domiciled" in Mississippi, but the constitutional justification was placed on the enjoyment of the benefits and privileges derived from [actual] residence in the state.

In an analysis of this case in 1937 it was said:

"The basic assumption of the opinion is that responsibility for sharing the costs of government is inseparable from the enjoyment of the privileges of residence within a state and the concomitant right to invoke the protection of its laws. Hence, domicile itself is affirmed to constitute a basis for taxation. The Federal Constitution is said



to leave a state unrestricted in its power to tax those domiciled within it so long as the tax is imposed on property within the state or on privileges enjoyed therein and is not so palpably arbitrary or unreasonable as to infringe the Fourteenth Amendment. \* \* \* (Henry Rottschaefer, Professor of Law, University of Minnesota, "State Jurisdiction to Tax Income," Iowa Law Review, Vol. XX, No. 2, January 1937, page 305)

The clear import not only of the Lawrence case but of the law generally in this area is that the concept of domicile imports actual residence and that naked domicile will not sustain a tax on income earned outside the state. It seems clear beyond peradventure that the Court would not sustain a tax on income earned outside the state on the basis of the somewhat ephemeral type of "domicile" of one who, like the Petitioner herein, maintained no place of abode whatever within the state and was not actually

resident therein at any time during the taxable period involved.

It was this concept of the limitations on a state constitutional jurisdiction to impose an income tax, foreshadowed over a period of years, which was responsible for the New York statute of 1922 including the dual returns provision of §367-a (now §654(a)).

\* \* \*

In both cases [domicile and nondomicile], actual residence is essential to sustain the tax. Sec. 654(a) simply gives effect to this constitutional requirement for a domiciliary in the year of change of residence, as this Court did for Kritzik (Kritzik v. Gallman, 41 App.Div.2d 994, [1973]), under the "seven-month's" rule.

\* \* \*

Nor did the Petitioner here meet the requirement for taxation as a resident when he no longer had a permanent place of abode in New York to give substance to furnish a constitutional basis for taxation as a resident which his disembodied "domicile" lacked after April [sic: March] 1, 1965.

STATUTORY CONSTRUCTION WHERE POSSIBLE  
CONSTITUTIONAL INFIRMITY IS PRESENT

Upon the argument herein, counsel referred the Court to the holding in District of Columbia, Petitioner, v. Davis, Respondent, C.C.A.-D.C. 1/5/67, 371 Fed.2d 964, cert. denied 386 U.S. 1034, 87 Sup.Ct. 1487, 18 L.ed. 2d 598. In issue there was the constitutional question eliminated in New York by the split-year statute (§654(a)), namely, income tax unsupported by actual residence.

\* \* \*

[The respondents' construction] involves what has since the inception of state income taxes been regarded as a substantial question under the Federal Constitution.

ARGUMENT HEADINGS FROM BRIEF FOR PETITIONER-APPELLANT IN THE NEW YORK COURT OF APPEALS (Index No. 7478-73)

(Captions omitted)

Argument

- I. The State Does Not Have Jurisdiction to Tax The Out-of-State Income of a New York Domiciliary for a Period After He Has Permanently Left The State, Retaining Only a Naked Domicile. Attempted Exercise of Such Jurisdiction Would Violate the Fourteenth Amendment to the U.S. Constitution .....
- A. Constitutional Criteria for Income Tax Jurisdiction .....
- B. Precedents Recognizing Serious Constitutional Issue Regarding Pre-Residence or Post-Residence Out-of-State Income .....
- C. Application of Precedents to Facts of This Case .....

- II. The Court Can and Should Avoid Reaching the Serious Constitutional Issue of Jurisdiction, By Construing the Tax Law As Not Attempting To Impose the Tax in Question .....
- A. The Tax Law Must Be Construed, If Fairly Possible, So As To Avoid the Serious Doubt As To Its Constitutionality -- i.e., So As Not To Tax Appellant on Income Earned Out-of-State After March 1, 1965 .....
- B. It Is Fairly Possible In This Case To Construe the Tax Law So As To Avoid the Serious Doubt As To Its Constitutionality -- i.e., So As Not to Tax Appellant On Income Earned Out of State After March 1, 1965 .....
1. Statute on Its Face .....
2. The Kritzik Case .....